Office Supreme Court, U.S.
FILED
APR 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 988

JOSEPH BEASLEY, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH BEASLEY, JR.
Pro Se

Of Counsel:

MELVIN D. RUCKHAUS
JOHN E. BROWN,
Albuquerque, New Mexico

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	8
Appendix A—Statute	1a
B—Opinion below	1a

CITATIONS

Cases:	
Bollenbach v. United States, 326 U.S. 607	5, 6
District of Columbia v. McElligot, 117 U.S. 621	6
Harten v. Loffler, 212 U.S. 397	7
Rea v. Missouri, 84 U.S. 542	6
Statutes:	
18 U.S.C. 1341	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

JOSEPH BEASLEY, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on February 11, 1964.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 8, is reported at 327 F. 2d 566.

JURISDICTION

The judgment of the Court of Appeals was entered February 11, 1964. On March 10, 1964, by order of Mr. Justice White, the time within which to file a petition for writ of certiorari was extended to April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Whether petitioner was denied the right to trial by jury:

(a) Because of the supplemental, inconsistent instruction, changing the impression received by the jury from the whole of the instructions previously given, to the effect that the one issue for consideration was the statute of limitations, inferring that the only factual question that needed to be decided by the jury was whether the actual mailings were or were not barred by the statute of limitations.

(b) Because of the admission of expert testimony which assumed facts not in evidence which were essential elements of the crime charged in the indictment.

STATUTE INVOLVED

The statutory provision involved is 18 U.S.C. 1341, printed in Appendix A, *infra*, p. 7.

STATEMENT

Petitioner was tried in the Court below on a ten count grand jury indictment charging him with use of the mails to defraud in violation of 18 U.S.C. 1341. The jury verdict was guilty on all counts.

Each of the counts contained a date of mailing: counts one, two, and three involved mailings on April 16, 1957; counts four, five, and six involved mailings on August 1, 1957; counts seven, eight, and nine involved mailings on August 15, 1957; count ten involved a mailing on September 27, 1957.

The instructions to the jury contain the following reference to the dates:

> These dates in there are important and pertinent in this case, because under the law under which Dr. Beasley is being prosecuted the offenses must have been committed within 5 years from the date of this Grand Jury indictment, which was returned on April 2, 1962, anything that occurred more than five years before that, as to the dates of these specific mailings would be out because of the statute of limitations. You will remember the testimony in that respect. It is important you remember this evidence as it relates to each count.

The supplemental instruction, given after completion of the reading of the instructions, was as follows:

> Ladies and Gentlemen of the Jury, in connection with my previous instructions on the statute of limitations, I further instruct you that as to each count, if the letter was mailed at any time after April 16, 1957, then such count is within the statute of limitations, and if all the elements of such count, including the date of mailing, have been proved to your satisfaction and beyond a reasonable doubt, then you would be warranted in convicting the defendant on such count, otherwise, you should acquit him of said count.

During the course of the trial below, the government introduced the testimony of Sam Dazzo (R. 66),

qualified attorney at law, as an expert witness. As a part of the direct examination by the prosecutor, Mr. Dazzo was asked the following question:

> "Q. At any time in the history of this land since the beginning of 1956, let us say, did these mining claims have a merchantable title in anybody?"

Mr. Dazzo gave the following answer:

> "A. Based on an examination of these abstracts, up to the certification date on the 16th day of July, 1962, the title is not merchantable in my opinion." (R. 72)

Mr. Dazzo testified that the title was not merchantable on July 16, 1962, two days before trial below. All ten counts of the indictment allege that the alleged fraudulent acts of the defendant occurred between January 11, 1957 and June 29, 1958.

In a similar manner the trial court admitted the testimony of a geologist, Henry S. Birdseye (TR. P. 11) and Martin Dworkis (TR. P. 96) to prove the worthlessness of the claims, following which the Court instructed the jury (T.R. P. 434):

> "You should decide this case wholly and solely upon the testimony that you have heard. While counsel have made opening statements in this case, which was proper, what the lawyers say in their opening statements or in their arguments is not evidence, just the same as the indictment is not evidence. The evidence is what you have heard from the witness stand and these various and sundry exhibits which have been permitted to go before you."

REASONS FOR GRANTING THE WRIT

1. The right of trial by jury is a right which this Court has jealously guarded. This Court has recognized "the importance that trial by jury has in our Bill of Rights." *Bollenbach* v. *United States*, 326 U.S. 617, 615.

The manner in which the case below was presented to the jury presents an important question in the administration of federal criminal justice. *Bollenbach* v. *United States*, 326 U.S. 617.

The trial judge gave a last-minute instruction requested by the prosecution, which renewed unwarranted emphasis on the statute of limitations issue, and was inconsistent with the prior instructions. The very first instruction given by the trial judge, after reading the indictment, concerned the statute of limitations. After completing the instructions and charging the jury, the trial judge gave the supplemental instruction, again concerning the statute of limitations.

The instructions first command attention to the dates as shown in the indictment, for comparison with the date of the indictment. The indictment, said the Court, was returned April 2, 1962. Later, without stating its reasons, the Court instructed that if a letter was mailed after April 16, 1957, this was sufficient for conviction. The instruction adds nothing to the previously given adequate charge. This inconsistency in dates could only mislead and confuse the jury. The April 16th date has no relation to any point in the previous instructions except the alleged dates of mailings in the first three counts. The emphasis placed on this date, and the statute of limitations issue, without

equal emphasis that the jury must consider the other elements of each count, withdraws petitioner's case from consideration by the jury.

A last minute instruction requires special care to avoid misleading the jury; the last words from the judge carry great weight with the jury. Hence, if it is an instruction on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. *Bollinbach v. United States*, 326 U.S. 607, 614.

A charge inconsistent with a charge previously given, resulting in a misleading attitude toward the jury is reversible error. *District of Columbia v. McElligott*, 117 U.S. 621.

Where the manifest tendency of an additional instruction is to give the jury an impression different from that which they first held, the instructions are misleading and constitute reversible error. *Rea v. Missouri*, 84 U.S. 532.

One of the essential elements of the crime charged in the indictment was:

> (1) That defendant had uranium claims in McKinley County which were of doubtful validity and that he knew such claims were of doubtful validity.

The prosecution sought to prove this essential element by the testimony of an expert witness.

Sam Dazzo, a qualified attorney at law, testified that the claims in question were unpatented mining claims. (R. 73). Further, that unpatented mining claims were normally marketable and extremely valuable. (R. 76)

Based on his examination of the abstract on July 16, 1982 and finding "conflicting" claims therein, his conclusion was that there was no "marketable title". (R. 72) Yet he admits that physical examination of the property is the only way to determine whether the "conflicting" claims exist. (R. 74) Hence, his conclusion was based on the *assumed* validity of other claims, a fact not within his knowledge and not in evidence by his own admission. (R. 69)

It is fundamental that an expert witness cannot answer a question which assumes a fact for which there is no evidence to support. *Harten* v. *Loffler*, 212 Kans. 397.

It might be argued that this alone would not be reversible error, however, when the inferences and conclusions of the experts become clothed with the authority shown in the instruction (TR. P. 134) the jury feels that it is being told not to listen to any arguments on the question of proof of the essential elements of the crime that might be made by any attorney but to take the inferences testified to from the stand by the experts as proven facts. Thus the jury, by a combination of the admission of expert testimony and an unfortunately worded instruction is being relieved of its prime honor prerogative to decide the factual issues; and the defendant is thereby denied his right to a trial by jury.

Although it might logically be reasoned that this situation must have arisen on innumerable cases in the past, our search has revealed no cases where a combination of minor infractions of the rules of procedure have by their total impact denied a defendant his constitutional right.

CONCLUSION

For the foregoing reasons it is believed by the undersigned that this Court should give this defendant the privilege of arguing this theory as a case of first impression in this Court and respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH BEASLEY, JR.
Pro Se

Of Counsel:

MELVIN D. RELCKHAUS
JOHN E. BROWN
Albuquerque, New Mexico

April 10, 1964